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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 6 Original

THE UNITED STATES OF AMERICA,
*Plaintiff,*

*vs.*

STATE OF CALIFORNIA,
*Defendant*

# REPLY OF THE COMMONWEALTH OF MASSACHUSETTS TO THE MEMORANDUM OF THE SOLICITOR-GENERAL IN OPPOSITION TO MOTION OF MASSACHUSETTS FOR LEAVE TO INTERVENE.

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J. J. SPIEGEL,
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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1945**

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## No. 12 Original

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THE UNITED STATES OF AMERICA,
*Plaintiff,*

*vs.*

STATE OF CALIFORNIA,
*Defendant*

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**REPLY OF THE COMMONWEALTH OF MASSACHUSETTS TO THE MEMORANDUM OF THE SOLICITOR-GENERAL IN OPPOSITION TO MOTION OF MASSACHUSETTS FOR LEAVE TO INTERVENE.**

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The Commonwealth of Massachusetts submits herewith the following reply to the memorandum of the Solicitor-General opposing its motion to intervene.

The Solicitor-General advances two reasons for his objections. One, that Massachusetts did not follow the technical rule of pleading by presenting a proposed answer with its application for intervention. Two, that Massachusetts has no interest in the bed of the ocean off the coast of California and the intervention would, therefore, broaden the scope of the litigation.

As to the first point, attention is called to the fact that this action is not an ordinary one concerning a difference between individuals, but a controversy between sovereigns. In such a controversy this Court has held that the technical

rules of pleading applicable between private litigants need not be followed. *Virginia* v. *West Virginia*, 234 U. S. 117 at 121. The following excerpt from this case is pertinent:

> "As we have pointed out, in acting in this case from first to last the fact that the suit was not an ordinary one concerning a difference between individuals, but was a controversy between States involving grave questions of public law determinable by this court under the exceptional grant of power conferred upon it by the Constitution, has been the guide by which every step and every conclusion hitherto expressed has been controlled. And we are of the opinion that this guiding principle should not now be lost sight of, to the end that when the case comes ultimately to be finally and irrevocably disposed of, as come ultimately it must in the absence of agreement between the parties, there may be no room for the slightest inference that the more restricted rules applicable to individuals have been applied to a great public controversy, or that anything but the largest justice after the amplest opportunity to be heard has in any degree entered into the disposition of the case."

As to the second point, no one would seriously contend that the Commonwealth of Massachusetts has a direct interest in the title to the bed of the Pacific Ocean within the boundaries of the State of California. But the United States has already broadened the issues to include the lands beneath the bed of the ocean off the coast of every coastal state of the Union including particularly the original thirteen states. On Page Four of the statement in support of the motion to file the complaint, the following assertion appears:

> "This case involves the three-mile belt on the *open sea*, and this Court has never held that title to the bed of the ocean within the three-mile belt is in the individual states. At the time of the formation of the Union the first thirteen states did not own the lands

> underlying the three-mile belt, and the entire basis of the foregoing decisions, implying a grant to the new states in order to place them on an equal footing with the old, is therefore absent here. As rights in the three-mile belt, susceptible of possession and ownership, began to emerge subsequently, they emerged as property of the national sovereign, whose function it is to establish and vindicate those rights against the possible claims of other nations."

In a formal address delivered by the Honorable Tom C. Clark, Attorney General of the United States, before the conference of Attorneys General of the forty-eight states, in which he outlines the legal theory upon which the government's complaint in the present case was predicated, the Attorney General of the United States said:

> "It is the contention of the government that no states littoral to the oceans ever had or now has any interest in the marginal sea lands * * *."

and also

> "The decision of the Supreme Court, we hope, will settle the question as to all the coastal states of the Union."

If the decision of the court in the present case is to decide the question of the ownership of lands beneath navigable waters in all coastal states of the Union, then that decision will in a practical sense be as conclusive upon other coastal states as if it amounted to technical *res judicata.*

The Attorney General and the Solicitor General are asking the court to render a decision which will settle the question whether Massachusetts owns its submerged lands and at the same time asks the court to deny the petition of Massachusetts to be heard and present evidence as an intervenor in the case.

The Commonwealth of Massachusetts desires to plead and prove by evidence that at and before the formation

of the Union it did own within its borders the three-mile belt on the open sea, as well as all other lands under tidal and navigable waters within those borders. Said evidence consists in part of ancient records, and in part of acts of acquiescence by the United States, at divers times between 1790 and the present time, both before and since the effective date of the Act of Congress admitting California to the Union, by accepting from the Commonwealth of Massachusetts grants of land submerged under the open sea within the three-mile limit and under other tidal and navigable waters, and is in part as follows:

1. After a dispute existed in colonial times between the Massachusetts Bay Colony and the Colony of New Hampshire as to the boundary between them, the conflict was referred to George II, King of England, who in 1737 decided that the line between the two Colonies should run three miles north of the Merrimac River, and thereupon the line was surveyed in 1741. It runs:

> "N. 86° 07′ 30″ E. 876 feet to the center of a granite monument on Salisbury beach, and thence in the same cause three miles from low water mark to the limit of state jurisdiction."

Said line between Massachusetts and New Hampshire was approved by Acts of the Legislatures of the States of Massachusetts (Mass. Acts 1899, c. 369) and New Hampshire (N. H. Laws 1901 c. 115, p. 620).

2. The southern boundary of the State of Massachusetts was the subject of a long dispute with Rhode Island, which was finally settled by Acts of the Legislatures of the States of Massachusetts (Mass. Act 1883, c. 113) and of Rhode Island (R. I. Pub. Laws 1884, c. 417) as extending on a given course, then:

> "• • • distant 1 marine league southerly from the said shore line."

3. By Act of the Legislature of the State of Massachusetts in the year 1859 (Mass. Acts 1859, c. 289; Gen. Stats. 1860, c. 1, § 1) the easterly boundary of the State is defined as:

> "• • • the territorial limits of this commonwealth extend on marine league from its sea shore at extreme low water mark. If an inlet or arm of the sea does not exceed two marine leagues in width between its headlands, a straight line from one headland to the other is equivalent to the shore line."

4. The State of Massachusetts granted to the United States sites for four buoys at the mouth of the Merrimac River over "Hum Sands, Sunken Rock, Gangway Rock and Half Tide Rocks" by Chapter 4 of the Massachusetts Acts of 1790.

5. The State of Massachusetts granted to the United States submerged lands described as the rocks and flats under the piers in Merrimac River known as "Half Tide Rocks" by Chapter 1 of the Massachusetts Acts of 1816.

6. The State of Massachusetts granted to the United States submerged lands in the Harbor of Boston called "Nix's Mate" for the site of a beacon by Chapter 41 of the Massachusetts Acts of 1832. The petition for said legislation describes the site involved as a sunken island located in said harbor.

7. The State of Massachusetts granted to the United States submerged lands on and around Minot's Rock or Ledge in Massachusetts Bay by Chapter 109 of the Massachusetts Acts of 1847.

8. The State of Massachusetts granted to the United States the beacon site on Point Allerton Bar at the Narrows in Boston Harbor by Chapter 17 of the Massachusetts Acts of 1855.

9. The State of Massachusetts granted to the United States submerged lands extending 400 yards beyond low-water mark in front of a fort to be constructed by the United States, and also granted submerged lands 400 yards beyond low-water mark at Clark's Point, near New Bedford, by Chapter 100 of the Massachusetts Acts of 1856.

Each of the foregoing grants was accepted by the United States.

10. By Act of the Legislature of the State of Massachusetts approved April 9, 1880 (1880 Acts and Resolves of Massachusetts, Page 133) said State authorized its board of harbor and land commissioners to convey to the United States the title of the Commonwealth of Massachusetts to any tracts of land covered by navigable waters within the Commonwealth for the purpose of erecting lighthouses, beacon lights, range lights or other aids to navigation. Said Act provides in part as follows:

> "The board of harbor and land commissioners, with the approval of the governor and council, are hereby authorized in the name and behalf of the Commonwealth to convey to the United States the title to any tracts of land covered by navigable waters within the Commonwealth, necessary for the purpose of erecting light-houses, beacon lights, range lights or other aids to navigation, and light keepers' dwellings, upon the application of any authorized agent or agents of the United States: * * *"

Under the foregoing act, numerous grants were made, and were accepted by the United States.

11. By Act of the Legislature of the State of Massachusetts approved February 14, 1889 (1889 Acts and Resolves of Massachusetts, Page 801) said State granted to the United States the right to occupy and fill certain tide and submerged lands belonging to said State and to erect struc-

tures thereon located on Gallop's Island in Boston Harbor acquired for the construction and protection of sea walls. Said Act provides in part as follows:

> "Jurisdiction is hereby granted and ceded to the United States over so much of Gallop's island in Boston harbor as may be required for the construction and protection of the sea-walls to be erected for the security of Boston harbor.
>
> "The United States government *is hereby authorized to occupy and fill such flats belonging to the Commonwealth, and to place in or over tide-water* such structures as may be necessary for the purposes for which the premises over which jurisdiction is ceded in section one are to be used, and upon such terms and conditions as shall be prescribed by the harbor and land commissioners."

12. By Act of the Legislature of the State of Massachusetts approved February 7, 1899 (1899 Acts and Resolves of Massachusetts, Page 41), said State granted to the United States title and jurisdiction to the submerged lands lying in front of the Boston navy yard between the limits of the wharf line of said navy yard and the pier and bulkhead line, and authorized the United States to fill the area of submerged lands thus granted. Said Act provides in part as follows:

> "For the purpose of enabling the United States of America to extend the present limits of the navy yard in Boston harbor the Commonwealth hereby grants and cedes to the United States jurisdiction over, and all right and claim of the Commonwealth to, that portion of land covered by navigable water lying between the limits of the wharf line of the said navy yard, as now constructed, and the pier and bulkhead line established by the secretary of war of the United States, * * *"

13. By Act of the Legislature of the State of Massachusetts approved April 22, 1903 (1903 Acts and Resolves of Massachusetts, Page 217), said State granted to the United States a rectangular parcel of submerged lands containing 435,000 square feet known as the "Graves" near the entrance to the harbor of Boston.

14. By Act of the Legislature of the State of Massachusetts approved May 25, 1905 (1905 Acts and Resolves of Massachusetts, Page 404), said State granted to the United States a tract of 77 1/2 acres of tide and submerged lands constituting the military reservation of Fort Revere in the town of Hull, Massachusetts.

15. By Act of the Legislature of the State of Massachusetts approved March 6, 1907 (1907 Acts and Resolves of Massachusetts, Page 123), said State granted to the United States so much of the tide and submerged lands belonging to said State as may be necessary for the purposes of the United States in purchasing a tract of 100 acres above mean low-water mark on Deer Island in Boston Harbor; and granted United States the right to place such structures in and over the adjacent tide water to said upland on Deer Island as may be necessary for purposes of the United States. Said Act provides in part as follows:

> "SECTION 3. The United States government is hereby authorized, upon such terms and conditions as may be prescribed by the harbor and land commissioners, to occupy and fill such flats belonging to the Commonwealth, and to place such structures in or over the tide water adjacent to the area herein authorized to be purchased as may be necessary for the purposes for which said area is to be used."

16. By Act of the Legislature of the State of Massachusetts approved June 14, 1911 (1911 Acts and Resolves of Massachusetts, Page 565), said State granted to the United

States submerged lands within an area of three acres situated in and on the southerly side of Boston Harbor. Said Act provides in part as follows:

> "SECTION 3. The commonwealth hereby cedes to the United States of America all tide water lands belonging to the commonwealth within the area to be acquired as aforesaid, and hereby grants to the United States the exclusive use and occupation thereof, together with the right to fill and dredge thereon, and to erect and maintain any and all structures thereon: *provided, however,* that the same shall revert to and revest in the commonwealth whenever the said lands shall cease to be used for the purposes set forth in this act."

17. The State of Massachusetts ceded jurisdiction to the United States over land required by the United States for a drydock by Chapter 270 of the Massachusetts Acts of 1919. Title to the same land was conveyed by the State of Massachusetts to the United States by separate deed dated April 28, 1920. A plan thereof is on file with the Waterways Division of the Department of Public Works of the State of Massachusetts, being File No. 11.127E. The major portion of the land described in said deed consisted of flats belonging to the Commonwealth of Massachusetts between high and low water mark. In addition said deed granted rights to the United States to dredge below low-water mark and to place wharves upon the submerged lands so dredged making a connection with the ship channel.

18. The State of Massachusetts granted to the United States additional submerged lands at Charlestown Navy Yard by Chapter 490 of the Massachusetts Acts of 1938. A further grant of submerged lands at the Navy Yard at Charlestown was granted to the United States by Chapter 12 of the Massachusetts Acts of 1941. A further grant

of submerged lands for similar piers at Charlestown was made by the State of Massachusetts to the United States by Chapter 659 of the Massachusetts Acts of 1941. The lands granted by said Chapter 659 extend deep into navigable waters below low-water mark.

19. The State of Massachusetts granted submerged lands to the United States at South Boston for an army base by Chapter 14 of the Massachusetts Acts of 1942. The lands thereby granted were mostly flats lying between high and low tide. In addition said grant conveyed the right to dredge below low-water mark and to construct piers below low-water mark.

20. The State of Massachusetts granted the United States title to submerged lands in Boston Harbor by Chapter 458 of the Massachusetts Acts of 1943. The land thus granted is situated below low-water mark.

In each one of the grants above described the United States through one of its departments has accepted each grant and in most cases has erected some structure upon the submerged land thus granted. In many cases Congress has appropriated funds for the proposed construction of improvements prior to the date when such submerged land was granted by the State of Massachusetts to the United States.

21. The United States has exercised its power of eminent domain in several instances to acquire by condemnation the title of the State of Massachusetts to portions of its submerged lands. In this connection petitioner alleges that:

(a) In Case 6537 Miscellaneous Civil in the United States District Court for the District of Massachusetts the United States condemned 12,500 feet of submerged land in Boston Harbor.

(b) In Cases Nos. 6770 and 7010 Miscellaneous Civil in the files of the United States District Court for the District of Massachusetts, the United States has condemned or sought to condemn submerged lands owned by the State of Massachusetts in Plum Island Sound, an arm of the sea.

The foregoing evidence is preserved principally in Massachusetts, can be most conveniently presented by Massachusetts and is of material and great importance to the State of California in this suit and also to the State of Massachusetts, title to whose lands is directly attacked by the United States Attorney General as hereinbefore set forth.

Petitioner believes that other evidence of a similar nature and also evidence of acts of recognition of the State's titles by other departments of the United States and by the United States attorneys exist in Massachusetts and petitioner will ask leave to introduce such further evidence and will file such further answers or pleading as may be required in connection therewith.

If Massachusetts is not permitted to intervene a multiplicity of actions may result.

Respectfully submitted,

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